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In the Supreme Court of the United States

OCTOBER TERM, 1978

EARNEST JACKSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	13

CITATIONS

Cases:

Blumenthal v. *United States*, 332 U.S. 539	11
Burks v. *United States*, 437 U.S. 1	12
Dutton v. *Evans*, 400 U.S. 74	11
Glasser v. *United States*, 315 U.S. 60	12
Harris v. *United States*, 412 F.2d 384	9
Harris v. *United States*, 390 U.S. 234	5-6
Katz v. *United States*, 389 U.S. 347	6, 7
Michelson v. *United States*, 335 U.S. 469	8
Rakas v. *Illinois*, No. 77-5781 (Dec. 5, 1978)	7
United States v. *Fisch*, 474 F.2d 1071, cert. denied, 412 U.S. 921	6
United States v. *Geaney*, 417 F.2d 1116, cert. denied, 397 U.S. 1028	11
United States v. *James*, 590 F.2d 575, petition for cert. pending, Nos. 78-1412, 78-6369 and 78-6431	10

Cases—Continued

	Page
United States v. *Ortega*, 471 F.2d 1350, cert. denied, 411 U.S. 948	7
United States v. *Petrozziello*, 548 F.2d 20	11
United States v. *Rixner*, 548 F.2d 1224, cert. denied, 431 U.S. 932	11
United States v. *Santiago*, 582 F.2d 1128	10
United States v. *Walker*, 313 F.2d 236, cert. denied, 374 U.S. 807	8
United States v. *Nixon*, 418 U.S. 683	11

Constitution, statutes and rules:

United States Constitution, Fourth Amendment	2, 5, 6, 7
21 U.S.C. 841(a)(1)	2
21 U.S.C. 846	2

Federal Rules of Evidence:

Rule 608	9
Rule 608(a)	9

Miscellaneous:

Advisory Committee's Note to Rule 608, 56 F.R.D. 183, 268 (1973)	9
Rules of Evidence: Hearings on Reform of Federal Criminal Laws Before the Special Subcomm. of the House Comm. on the Judiciary, 93d Cong., 1st Sess. (1973)	9
3 *Weinstein's Evidence* (1978)	9

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 59-85) is reported at 588 F.2d 1046.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1979. A petition for rehearing was denied on March 7, 1979 (Pet. App. 58). The petition for a writ of certiorari was filed on April 6,

1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether eavesdropping by law enforcement officers constituted an unreasonable search or seizure in violation of the Fourth Amendment.

2. Whether the district court properly excluded evidence of petitioner's truthfulness and veracity.

3. Whether extrajudicial statements of a co-conspirator were properly admitted into evidence.

4. Whether admission of evidence showing petitioner's possession of cocaine on a prior occasion not charged in indictment was prejudicial error.

5. Whether the evidence was sufficient to sustain petitioner's conviction for conspiracy.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of conspiracy, in violation of 21 U.S.C. 846 (Count 1), and possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2).[1] He was sentenced to consecutive terms of 12 years' imprisonment with 15 years of special parole on Count 1 and 15 years' imprisonment with 15 years of special parole on Count 2. The court of appeals reversed petitioner's conviction on the possession count and affirmed his conviction on the conspiracy count (Pet. App. 59-85).

[1] Petitioner's co-defendant, James Porter, was also convicted under both counts of the indictment.

The facts are set forth in detail in the opinion of the court of appeals (Pet. App. 60-63). In brief, the government's evidence showed that on July 4, 1977, petitioner checked into a hotel in Birmingham, Alabama. An off-duty Birmingham police officer working as a security guard at the hotel observed petitioner and notified DEA officials of his presence.[2] On July 6, a DEA agent and a Birmingham police officer checked into the hotel. They obtained a room adjoining petitioner's room so that they could monitor his activities. The two adjoining rooms were connected by a set of double doors. After entering the room, the officers noticed that they could hear conversations in petitioner's room by pressing their ears to the ¾ inch crack at the bottom of the connecting doors. The officers decided to maintain aural surveillance by that method. At no time did they attempt to enter petitioner's room or use any electronic or mechanical device to assist them in overhearing his conversations (Pet. App. 60-61).

Listening to the conversations in the adjoining room, the officers overheard petitioner make two telephone calls to Buffalo, New York, on July 6. During those calls petitioner stated, "No, I haven't been able to contact my man yet. [Pause.] It is like gold." and "The stuff is coming from L.A. [Pause.] No problem with my man." On the morning of July 7

[2] For several years DEA officials had suspected that petitioner was engaged in narcotics activities. The DEA had conducted a three-year investigation of petitioner, but that investigation produced no hard evidence that he was involved in the sale of narcotics (Pet. App. 60).

petitioner instructed his room guest, Beverly Pertilla, to call an airline and make flight reservations to Buffalo, New York. One of the officers thereupon ordered two undercover officers to go to the airport to set up surveillance. Later, petitioner received a call. He cursed, spoke in an excited manner for several minutes, and told Pertilla that "the stuff may be in trouble" and "the stuff is worth $40,000." Within 20 minutes petitioner received another telephone call in which he inquired, "[I]s the stuff all right? Is the suitcase still at the airport?" Following this conversation petitioner told Pertilla, "I don't know what went wrong. The police followed him to the airport. The suitcase is still at the airport. The flight came in at 9:08 and I don't know what went wrong" (Pet. App. 61-62).

Meanwhile, undercover officers had arrived at the airport and parked their unmarked car behind a car driven by petitioner's co-defendant, James Porter. After driving evasively through the terminal area, co-defendant Porter left the airport with a woman who had arrived at 9:08 a.m. on a flight from Los Angeles. The woman did not pick up her luggage before leaving the airport with Porter. The two men drove to the hotel where petitioner was staying. After escorting the woman to her room, Porter went directly to petitioner's room. Petitioner then said to Porter, "Is everything all right? Is the suitcase still at the airport? Good, let's go" (Pet. App. 62).

By the time Porter and petitioner arrived at the airport, the unclaimed suitcase had been placed in the baggage claims office. The suitcase, which was the only piece of unclaimed luggage, was sitting near a window where it was clearly visible. After walking past the baggage claims office, Porter and petitioner left the terminal. They were arrested as they attempted to leave the airport (Pet. App. 62).

Based on the information obtained as a result of their eavesdropping, DEA agents secured search warrants for the suitcase and petitioner's hotel room. Inside the suitcase, the agents found a zippered canvas bag containing approximately two pounds of heroin. The heroin had a wholesale value of approximately $40,000 and a street value of approximately $1,000,000. The search of petitioner's hotel room revealed a bag containing $42,000 in cash (Pet. App. 63).

ARGUMENT

1. Petitioner contends (Pet. 16-25) that the eavesdropping by law enforcement officials from an adjoining hotel room constituted an unreasonable search or seizure in violation of the Fourth Amendment. That claim was properly rejected by the court of appeals.

The aural surveillance maintained in this case was accomplished without the assistance of any artificial device and without the commission of any physical trespass; instead, it was conducted by the officers' use of their own unaided perception from a place where they had a right to be. See generally *Harris* v. *United*

States, 390 U.S. 234, 236 (1968). Under these circumstances, the court of appeals properly concluded that petitioner had no justifiable expectation of privacy with respect to conversations that could be overheard by persons in the adjoining room (Pet. App. 65).

The court of appeals recognized that, under *Katz* v. *United States*, 389 U.S. 347 (1967), a hotel room is entitled to certain protections under the Fourth Amendment. It noted, however, that an occupant of a hotel room has a lesser expectation of privacy than would be applicable to a private dwelling. As the court noted (Pet. App. 68; footnote omitted):

> In view of the open, public, and shared atmosphere of a motel, the nearness of one's neighbors, and the prevalence of uninvited listeners in human society, we hold that a motel room occupant assumes the risk of an eavesdropper when he carries on his conversations in a tone of voice audible to one outside the room.

This has been the accepted rule. In *United States* v. *Fisch*, 474 F.2d 1071, 1076-1079 (9th Cir.), cert. denied, 412 U.S. 921 (1973), another court of appeals approved a course of surveillance identical to that involved here. There, police officers occupying an adjoining hotel room were able to overhear the defendant's conversations by listening through a crack under the door between the rooms. In upholding the surveillance, the Ninth Circuit reasoned that the defendant's subjective expectations of privacy were not

enough; the expectations must be ones that society is prepared to recognize as reasonable. Upon weighing the interests involved, the court concluded that expectations of privacy surrounding conversations that could be overheard from an adjoining room were not entitled to Fourth Amendment protection. Accord, *United States* v. *Ortega*, 471 F.2d 1350, 1361 (2d Cir. 1972), cert. denied, 411 U.S. 948 (1973).

Nor is the result different because the officers assumed an unusual position to overhear petitioner's conversations. Whatever may be the case when artificial aids are used, there is no warrant for drawing distinctions between loud conversations that can be overheard from the middle of an adjoining room and those that can only be overheard at the door or between accidental overhearing and deliberate eavesdropping. When law enforcement officers are properly present in a room rented to the general public and overhear conversations audible to the unaided ear, their actions do not infringe the Fourth Amendment.[3]

2. Petitioner further contends (Pet. 26-31) that the district court's exclusion of evidence of his truthfulness and veracity offered by him at trial resulted in a denial of due process. The court of appeals properly concluded, however, that the district court

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[3] See generally *Katz* v. *United States*, *supra*, 389 U.S. at 351: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 15-16 n.12.

did not err in excluding that evidence. As the court of appeals observed (Pet. App. 73):

> We find no evidence of an attack upon Jackson's character for truthfulness. During the cross-examination the government attorney questioned Jackson closely about his version of the facts and pointed out conflicts between that testimony and the testimony of other witnesses. However, "[t]he mere fact that a witness is contradicted by other evidence in the case does not constitute an attack upon his reputation for truth and veracity." *Kauz* v. *United States*, 188 F.2d 9, 10 (5th Cir. 1951). See *Homan* v. *United States*, 279 F.2d 767, 772 (8th Cir. 1960).

Here, petitioner's character was not in issue. Nor was his veracity assailed or otherwise put in issue by the government. Petitioner appears to confuse (Pet. 26-27) general character evidence that may be relevant in showing the existence or nonexistence of a trait likely to cause the commission of the crime with evidence of truthfulness and veracity, which may be offered in support of credibility. See *United States* v. *Walker*, 313 F.2d 236, 238 (6th Cir.), cert. denied, 374 U.S. 807 (1963). It is generally accepted that a defendant may introduce evidence bearing on those character traits relevant to the crime charged to show that the general estimate of his character is so favorable that a jury may infer that he did not commit the offense. See *Michelson* v. *United States*, 335 U.S. 469 (1948). Evidence of a witness' reputation for truthfulness is admissible, however, "only after

the character of the witness for truthfulness has been attacked * * *." Fed. R. Evid. 608(a). Because evidence of truthfulness was not pertinent to the criminal charge of conspiracy to distribute heroin (Pet. App. 72), petitioner was properly precluded from introducing such evidence in the absence of an attack on his credibility. See *Harris* v. *United States*, 412 F.2d 384, 388 (9th Cir. 1969).[4]

The court's ruling follows the legislative history of Rule 608. The Advisory Committee's Note to Rule 608 explicitly states that "[c]haracter evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law" (56 F.R.D. 183, 268 (1973)). This rule applies with equal force to all witnesses, including the accused in a criminal trial. Language that would have excepted criminal defendants from the limits of Rule 608 was deleted from a preliminary draft of the rule. *Rules of Evidence: Hearings on Reform of Federal Criminal Laws Before the Special Subcomm. of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 316 (1973). See 3 *Weinstein's Evidence* ¶ 608[02], at 608-14 (1978).

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[4] Petitioner points generally (Pet. 31) to his cross-examination by the government (Tr. 840-870) in support of his contention that the government attacked his credibility and veracity. However, the mere propounding of questions on cross-examination did not constitute a direct attack on his credibility, and, in the absence of such an attack, petitioner was properly barred from offering evidence of his reputation for truthfulness and veracity.

3. Petitioner also challenges (Pet. 33-54) the admissibility of certain statements of a co-conspirator.

Linda Johnson, the person who carried the heroin by airplane, met co-defendant Porter in Los Angeles in June 1977. He invited her to a family reunion in Birmingham, and she agreed to attend. On July 6, a woman whom Johnson did not know stopped by her apartment and gave her $130 for air fare. She also handed her a canvas bag (in which the heroin was hidden) and requested that she pack it with the things she would need on her trip. The woman also told Johnson that Porter would pick her up at the Birmingham airport (Pet. App. 78-79 n.4).

Petitioner maintains that there was insufficient evidence to show that the unidentified woman was a member of the conspiracy and that even if the evidence was sufficient, the admission of the declarations of the co-conspirator violated the Confrontation Clause. Contrary to petitioner's contention, however, the declarant was adequately shown to have been a participant in the conspiracy to distribute heroin. The declarant gave Johnson the heroin and the money for her plane ticket. The declarant also informed her that co-defendant Porter would pick her up. This independent proof was sufficient to establish by a preponderance of the evidence that there was an illicit association between the declarant and the other conspirators. *United States* v. *James*, 590 F.2d 575, 579-581 (5th Cir. 1979), petition for cert. pending, Nos. 78-1412, 78-6369 and 78-6431; *United States* v. *Santiago*, 582 F.2d 1128, 1135-1136 (7th Cir. 1978);

United States v. *Petrozziello*, 548 F.2d 20, 23-24 (1st Cir. 1977); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). The government was not required to establish that each participant had knowledge of all phases or details of the conspiracy, or that he or she knew all the conspirators. *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947). Accordingly, the statements of the co-conspirator were properly placed before the jury.[5]

4. Petitioner further contends (Pet. 31-32) that admission of evidence suggesting that he returned to his hotel with a small quantity of cocaine on an occasion not referred to in the indictment constituted reversible error. This testimony was inadvertently elicited by the government during its examination of Beverly Pertilla. No emphasis was placed on the evidence during closing argument. In light of the overwhelming weight of evidence against petitioner, the court below correctly held that petitioner was not

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[5] Declarations of a co-conspirator made during the course of and in furtherance of the conspiracy may be received without infringing the Confrontation Clause. *United States* v. *Nixon*, 418 U.S. 683, 701 (1974); *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970). As the court of appeals noted, moreover, none of the statements of the unidentified co-conspirator were used to prove the truthfulness of the matters asserted. Those statements were merely directions to Johnson about her trip to Birmingham. As such, they do not present "hearsay" or "confrontation" issues (Pet. App. 78-79 n.4). Petitioner's claim that the district court erred in failing to give a limiting instruction is equally insubstantial. No such instructions were requested. See *United States* v. *Rixner*, 548 F.2d 1224, 1227 (5th Cir.), cert. denied, 431 U.S. 932 (1977).

prejudiced and that the error was harmless beyond a reasonable doubt (Pet. App. 75).

5. Finally, there is no merit to petitioner's claim (Pet. 54-56) that the evidence was insufficient to sustain his conviction for conspiracy to distribute heroin. As noted above, the evidence showed that petitioner was expecting heroin to be delivered from Los Angeles and that he had been informed that it would arrive at 9:08 a.m. on July 7, 1977. Johnson, whose suitcase contained the heroin, arrived in Birmingham at 9:08 a.m. from Los Angeles. When Johnson was picked up at the airport by co-defendant Porter, her suitcase was left at the airport. Her suitcase was the only luggage not claimed from the flight that had arrived at 9:08 a.m. Petitioner had previously explained to Pertilla his fear that the "stuff" was in trouble and that the police had followed his carrier to the airport. Petitioner discussed the suitcase that had been left at the airport with co-defendant Porter when he arrived at the hotel. Petitioner suggested that they return to the airport and get the suitcase. The two went to the airport and walked around the area where the suitcase was held. Approximately $40,000 in cash was later recovered from petitioner's hotel room, which was the purported value of the heroin shipment. This evidence was plainly sufficient to permit the jury to infer that petitioner was involved in the conspiracy. See *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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